

1 Anni L. Foster (#023643)
2 General Counsel
3 Office of Arizona Governor Douglas A. Ducey
4 1700 West Washington Street
5 Phoenix, Arizona 85007
6 Telephone: 602-542-4331
7 E-Mail: afoster@az.gov

5 Brett W. Johnson (#021527)
6 Colin P. Ahler (#023879)
7 Derek C. Flint (#034392)
8 Ian R. Joyce (#035806)
9 SNELL & WILMER L.L.P.
10 One Arizona Center
11 400 E. Van Buren, Suite 1900
12 Phoenix, Arizona 85004-2202
13 Telephone: 602.382.6000
14 Facsimile: 602.382.6070
15 E-Mail: bwjohnson@swlaw.com
16 cahler@swlaw.com
17 dflint@swlaw.com
18 ijoyce@swlaw.com

19 *Attorneys for Plaintiff Douglas A. Ducey,
20 Governor of the State of Arizona*

21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Douglas A. Ducey, Governor of the State of
Arizona, in his official capacity,

Plaintiff,
v.
Janet Yellen, Secretary of the Treasury, in
her official capacity; Richard K. Delmar,
Acting Inspector General of the Department
of Treasury, in his official capacity; and
U.S. Department of the Treasury,

Defendants.

No.

**Complaint for Declaratory and
Injunctive Relief**

Snell & Wilmer
L.L.P.

LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

INTRODUCTION

“All legislative Powers herein granted shall be vested in a Congress of the United States...” U.S. Const. art. I, § 1.

1. The COVID-19 pandemic has created havoc in the lives of every citizen of our nation, and its biggest impact has been on our children. The loss of learning, socialization and opportunity has set our children back years, even with the great efforts made by parents and educators.

2. This is why the State of Arizona, through the Governor's Office, implemented programs in accordance with federal law and regulations, using funds appropriated to it by Congress, to bridge the gaps, get our children back in school and get them back on track academically.

3. Yet, following implementation of these programs, Arizona has been put on notice that funding, along with the children and parents it assists, will be held hostage if Arizona fails to bend to the arbitrary and capricious authority of a federal regulatory agency.

4. Douglas A. Ducey, Governor of the State of Arizona, cannot allow this action to stand without protest. The work of mitigating COVID-19 “belongs to state and local governments across the country and the peoples elected representatives in Congress.” *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 2022 WL 120952, at *3 (U.S. Jan. 13, 2022) (Gorsuch, J., concurring).

5. This case arises out of the U.S. Department of the Treasury (“Treasury”) seeking to usurp Congressional power in the area of COVID-19 financial relief. Through its attempted legislative action, Treasury seeks to deprive the State of Arizona of millions of dollars in aid that Congress appropriated for the purpose of mitigating the negative economic impacts of the COVID-19 pandemic—monies that are critically needed to recover from the pandemic’s effects on education, including the remote learning that disproportionately impacted low-income students. If these effects are not addressed, they will have long-term economic, educational and social, consequences.

6. The genesis of the dispute is Congress's passage of the American Rescue Plan

1 Act of 2021 (“ARPA”). Among other things, ARPA created the Coronavirus State and
2 Local Fiscal Recovery Fund (the “SLFRF”). In the text of ARPA, Congress specifically
3 described the permissible uses of SLFRF monies by States and also specifically described
4 restrictions on such uses.

5 7. Initially, Treasury—which was tasked with distributing SLFRF monies and
6 creating implementing regulations—correctly recognized that ARPA gave the States
7 “*broad latitude* to choose whether and how to use the [SLFRF funds] to respond to and
8 *address the negative economic impact*” of COVID-19. Coronavirus State and Local Fiscal
9 Recovery Funds, 86 Fed. Reg. 26786, 26794 (May 17, 2021) (emphasis added). Treasury
10 further recognized that one way for States to address the negative economic impact of
11 COVID-19 would be through programs focused on the educational impacts of remote or
12 hybrid learning, which disproportionately affected low-income and minority students.

13 8. In accordance with Treasury’s statements, as well as the text of ARPA,
14 Governor Ducey used some of the SLFRF monies to create two grant programs that
15 addressed the long-term, negative economic impacts on disadvantaged communities from
16 school closures and overbearing mask mandates. The programs empower parents and
17 students to exercise their freedom to make informed decisions regarding their health and
18 educational needs.

19 9. More recently, however, Treasury arbitrarily changed its guidance, and
20 through a clear abuse of discretion, is seeking to unilaterally amend ARPA by adding new
21 health conditions on how SLFRF monies may be used. In particular, and even though
22 Treasury has no background expertise in public health, Treasury recently issued a Final
23 Rule that purports to prohibit SLFRF monies from being used in a manner that, in the
24 subjective and ill-informed opinion of Treasury, would undermine efforts to stop the spread
25 of COVID-19. Based on its policy objections to the two grant programs referenced above,
26 Treasury has also indicated to Governor Ducey that, even though this Final Rule does not
27 become effective until April 1, 2022, the Rule somehow authorizes Treasury to: (1) recoup
28 SLFRF monies distributed to the State; and (2) withhold future SLFRF distributions.

1 10. Treasury's actions far exceed the statutory authority granted to it under
 2 ARPA. Nothing in that underlying statute authorizes Treasury to condition the use of
 3 SLFRF monies on following measures that, in the view of Treasury, stop the spread of
 4 COVID-19. If Congress had truly intended to give Treasury the power to dictate public
 5 health edicts to the States, and recoup or withhold SLFRF monies based on an alleged lack
 6 of compliance with such edicts, it would have spoken clearly on the matter. It did not.
 7 Moreover, even if Treasury were correct that ARPA conferred it the broad authority it now
 8 claims to attach new conditions on SLFRF monies, then the statute would violate the
 9 Spending Clause of the U.S. Constitution and the non-delegation doctrine. This Court
 10 should declare the Final Rule invalid, declare that Treasury has acted arbitrarily and
 11 capriciously and has abused its discretion, and enjoin Treasury's legislative overreach.

12 **PARTIES, JURISDICTION AND VENUE**

13 11. Plaintiff Douglas A. Ducey is the Governor of the State of Arizona. Under
 14 Arizona law, Governor Ducey is the official authorized to accept and expend funds received
 15 from the federal government or any agency thereof. *See Ariz. Rev. Stat. § 41-101.01(A).*
 16 Pursuant to this authority, Governor Ducey has accepted and expended SLFRF monies.
 17 Additionally, Governor Ducey serves as the sole State official responsible for
 18 communications between the State of Arizona and the federal government. *See Ariz. Rev.*
 19 *Stat. § 41-101(A)(4).*

20 12. Defendant Janet L. Yellen is the Secretary of the Treasury of the United States
 21 and is named in her official capacity.

22 13. Defendant Richard K. Delmar is the Acting Inspector General of the
 23 Department of the Treasury and is named in his official capacity. On information and belief,
 24 the Inspector General is responsible for monitoring and oversight of COVID-19 relief funds
 25 that have been disbursed to the States, and is generally responsible for informing and
 26 advising the Secretary of the Treasury about programs administered by Treasury and the
 27 need for corrective action.

28 14. Defendant the U.S. Department of the Treasury is an agency of the United

States. Treasury is not a public health agency and does not have expertise in this area.

Rather, on its website, Treasury describes its role as follows:

The Treasury Department is the executive agency responsible for promoting economic prosperity and ensuring the financial security of the United States. The Department is responsible for a wide range of activities such as advising the President on economic and financial issues, encouraging sustainable economic growth, and fostering improved governance in financial institutions. The Department of the Treasury operates and maintains systems that are critical to the nation's financial infrastructure, such as the production of coin and currency, the disbursement of payments to the American public, revenue collection, and the borrowing of funds necessary to run the federal government. The Department works with other federal agencies, foreign governments, and international financial institutions to encourage global economic growth, raise standards of living, and to the extent possible, predict and prevent economic and financial crises. The Treasury Department also performs a critical and far-reaching role in enhancing national security by implementing economic sanctions against foreign threats to the U.S., identifying and targeting the financial support networks of national security threats, and improving the safeguards of our financial systems.¹

15. This Court has jurisdiction under 28 U.S.C. §§ 1331, and 2201-02.

16. Venue in the District of Arizona is proper under 28 U.S.C. § 1391(e) because:

(1) Governor Ducey resides in this district, is the State official responsible for communications between the State of Arizona and the federal government, and this case does not involve real property; and (2) “a substantial part of the events and omissions giving rise to the claim occurred” in this district—namely, the receipt and disbursement of SLFRF monies.

GENERAL ALLEGATIONS

I. The Provisions of ARPA

17. On March 11, 2021, President Joseph Biden signed ARPA into law.

18. Section 9901 of ARPA amends Title VI of the Social Security Act (42 U.S.C. § 801 *et seq.*) to establish the SLFRF.

19. The SLFRF appropriates \$219,800,000,000 to States, territories, and Tribal

¹ *Role of the Treasury*, U.S. Department of the Treasury (last visited Jan. 20, 2022), <https://home.treasury.gov/about/general-information/role-of-the-treasury>

1 governments “to mitigate the *fiscal* effects stemming from the public health emergency with
 2 respect to the Coronavirus Disease.” 42 U.S.C. § 802(a)(1) (emphasis added).

3 20. In Section 9901 of ARPA, Congress expanded on the permissible uses of
 4 SLFRF monies. 42 U.S.C. § 802(c)(1). In particular, Congress mandated in 42 U.S.C.
 5 § 802(c)(1) that the funds be used for one of four purposes:

6 (A) to respond to the public health emergency with respect to
 7 the Coronavirus Disease 2019 (COVID–19) or its negative
 8 economic impacts, including assistance to households, small
 businesses, and nonprofits, or aid to impacted industries such as
 tourism, travel, and hospitality;

9 (B) to respond to workers performing essential work during the
 10 COVID–19 public health emergency by providing premium
 11 pay to eligible workers of the State, territory, or Tribal
 government that are performing such essential work, or by
 12 providing grants to eligible employers that have eligible
 workers who perform essential work;

13 (C) for the provision of government services to the extent of the
 14 reduction in revenue of such State, territory, or Tribal
 15 government due to the COVID–19 public health emergency
 relative to revenues collected in the most recent full fiscal year
 of the State, territory, or Tribal government prior to the
 emergency; or

16 (D) to make necessary investments in water, sewer, or
 17 broadband infrastructure.

18 21. In 42 U.S.C. § 802(c)(2), Congress described two restrictions on the use of
 19 SLFRF monies:

20 (A) IN GENERAL.—A State or territory shall not use the
 21 funds provided under this section or transferred pursuant to
 22 section 803(c)(4) of this title to either directly or indirectly
 23 offset a reduction in the net tax revenue of such State or territory
 24 resulting from a change in law, regulation, or administrative
 interpretation during the covered period that reduces any tax (by
 providing for a reduction in a rate, a rebate, a deduction, a
 credit, or otherwise) or delays the imposition of any tax or tax
 increase.

25 (B) PENSION FUNDS. —No State or territory may use funds
 26 made available under this section for deposit into any pension
 fund.

27 22. ARPA also provided that Treasury may provide SLFRF funds to States in
 28 separate installments with the only requirement for acceptance of each installment that the

1 State sign a certification stating that the funds will only be used for the purposes outlined
 2 in the statute. 42 U.S.C. § 802(b)(6)(A)(ii) and (d).

3 23. ARPA does *not* contain any provisions that prohibits State, local, or Tribal
 4 governments from using SLFRF monies on programs that according to Treasury
 5 “undermine” efforts to stop the spread of COVID-19 or that require compliance with CDC
 6 recommendations or guidance—notably such provisions would put Treasury responsible
 7 for determining public health protocols, for which it is not qualified or, more importantly,
 8 statutorily-authorized.

9 24. In discussing the recoupment remedy, Congress explained that “[a]ny State,
 10 territory, or Tribal government that has failed to comply with” 42 U.S.C. § 802(c) in its use
 11 of SLFRF monies “shall be required to repay to the Secretary [of the Treasury] an amount
 12 equal to the amount of funds used in violation of such subsection.” 42 U.S.C. § 802(e).

13 25. Congress also provided some authority to Treasury to withhold monies based
 14 on a lack of compliance with 42 U.S.C. § 802(c): “If a State or territory is required under
 15 [42 U.S.C. § 802(e)] to repay funds for failing to comply with [42 U.S.C. § 802(c)], the
 16 Secretary may reduce the amount otherwise payable to the State or territory. 42 U.S.C.
 17 § 802(b)(6)(ii)(III).

18 26. Congress also gave the Secretary of the Treasury “the authority to issue such
 19 regulations as may be necessary or appropriate to carry out this section.” 42 U.S.C. § 802(f).

20 **II. Treasury’s Interim Final Rule**

21 27. On May 17, 2021, Treasury published in the Federal Register an “Interim
 22 Final Rule” implementing the SLFRF. Coronavirus State and Local Fiscal Recovery Funds,
 23 86 Fed. Reg. 26786 (May 17, 2021). A copy of the Interim Final Rule is attached as Exhibit
 24 1.

25 28. The Interim Final Rule described how a state could use SLFRF in order to fall
 26 within one of the four categories of permissible uses described in 42 U.S.C. § 802(c)(1).

27 29. For instance, with respect to the first category of permissible use (42 U.S.C.
 28 § 802(c)(1)(A)), the Interim Final Rule described how a program could respond to the

1 COVID-19 public health emergency *or* the negative economic impacts of the pandemic. In
 2 fact, the Interim Final Rule addressed each of these two topics separately, under different
 3 headings—one section was titled “Responding to COVID-19,” while another was titled
 4 “Responding to Negative Economic Impacts.” The Interim Final Rule also explained:
 5 “While the COVID-19 public health emergency affected many aspects of American life,
 6 eligible uses under this category must be in response to the disease itself *or the harmful*
 7 *consequences of the economic disruptions resulting from or exacerbated by the COVID-19*
 8 *public health emergency.*” 86 Fed. Reg. at 26788 (emphasis added).

9 30. In the section addressing “Responding to Negative Economic Impacts,” the
 10 Interim Final Rule provided that “[w]here there has been a negative economic impact
 11 resulting from the public health emergency, States, local, and Tribal government *have broad*
 12 *latitude to choose whether and how to use the Fiscal Recovery Funds to Respond to and*
 13 *address the negative economic impact.*” 86 Fed. Reg. at 26794 (emphasis added).

14 31. The Interim Final Rule then detailed, on several occasions, how a state could
 15 respond to negative economic impacts of COVID-19 by addressing the educational impacts
 16 of the pandemic. For instance, the Interim Final Rule stated:

- 17 a. “The negative economic impacts of COVID-19 also include significant
 18 impacts to children in disproportionately affected families *and include*
 19 *impacts to education, health, and welfare, all of which contribute to long-term*
 20 *economic outcomes.*” 86 Fed. Reg. at 26793 (emphasis added).
- 21 b. “Many low-income and minority students, *who were disproportionately*
 22 *served by remote or hybrid education during the pandemic, lacked the*
 23 *resources to participate fully in remote schooling or live in households*
 24 *without adults available throughout the day to assist with online coursework.*”
 25 *Id.* (emphasis added).
- 26 c. “Given these trends, *the pandemic may widen educational disparities* and
 27 *worsen outcomes for low-income students, an effect that would substantially*
 28 *impact their long-term economic outcomes. Increased economic strain or*

1 material hardship due to the pandemic could also have a long-term impact on
 2 health, educational, and economic outcomes of young children.” *Id.*
 3 (emphasis added).

4 32. Accordingly, the Interim Final Rule stated that SLFRF monies may be used
 5 on: “Evidence-based educational services and practices to address the academic needs of
 6 students, including tutoring, summer, afterschool, and other extended learning and
 7 enrichment programs.” 86 Fed. Reg. at 26796. Other permissible uses of SLFRF monies
 8 include: “Evidence-based practices to address the social, emotional, and mental health
 9 needs of students.” *Id.*

10 33. Although Treasury included examples of allowable uses of SLFRF monies, it
 11 also noted that such examples were not exhaustive and provided the following guidelines
 12 for States to use to analyze whether programs complied with the statutory provisions: (1)
 13 “a recipient should first consider whether an economic harm exists;” and (2) whether use of
 14 the funds would “respond to” or address the harm. 86 Fed. Reg. at 26794.

15 34. Treasury also released a “Frequently Asked Questions” guidance document
 16 about the Interim Final Rule, which similarly explained that SLFRF monies may be used to
 17 “Address[] educational disparities exacerbated by COVID-19, including: early learning
 18 services, increasing resources for high-poverty school districts, educational services like
 19 tutoring or afterschool programs, and supports for students’ social, emotional, and mental
 20 health needs.” [Exhibit 2, *Coronavirus State and Local Fiscal Recovery Funds Interim Final*
 21 *Rule: Frequently Asked Questions*, U.S. Department of the Treasury, at 7-8 (Jan. 2022),
 22 <https://home.treasury.gov/system/files/136/SLFRPFAQ.pdf>.]

23 35. The Interim Final Rule does *not* contain any provision that prohibits States
 24 from using SLFRF monies on programs that supposedly “undermine” efforts to mitigate the
 25 spread of COVID-19 or are inconsistent with any CDC guidance or recommendations
 26 relating to the spread of COVID-19.

27 **III. Arizona’s Use of SLFRF Monies**

28 36. With the Interim Final Rule in place, on May 21, 2021, Matthew Gress,

1 Director of the Governor’s Office of Strategic Planning and Budgeting (“OSPB”), signed a
 2 certification form issued by Treasury authorizing Treasury to make SLFRF payments to the
 3 State.

4 37. Subsequent to that certification, the State received the first “tranche” of
 5 SLFRF funding.

6 38. On August 17, 2021, Governor Ducey announced the Education Plus-Up
 7 Grant Program (“Plus-Up”). Plus-Up made \$163 million in ARPA funds available to
 8 Arizona school districts and charter schools that received less than \$1,800 per pupil under
 9 previous programs that were also intended to mitigate the economic impacts of COVID:
 10 namely, the Enrollment Stabilization Grant Program and/or the Elementary and Secondary
 11 School Emergency Relief Fund.

12 39. Governor Ducey’s announcement of Plus-Up explained that the program “is
 13 designed to further aid in the mitigation of the economic impacts of COVID-19 and further
 14 ensure financial stability to Arizona Local Education Agencies.” *State Fiscal Recovery*
 15 *Fund: Education Plus-Up (EPU)*, eCivis (last visited Jan. 20, 2022),
 16 https://gn.ecivis.com/GO/gn_redir/T/1sdmeoc0bsnvo.

17 40. Consistent with this purpose, Plus-Up funds must be used on expenses
 18 directly related to the mitigation of the impacts of the COVID-19 pandemic. *Id.* (under
 19 “Eligibility” tab). Expenditures not directly related to mitigating the impacts of the COVID-
 20 19 pandemic are prohibited. *Id.* (under “Eligibility” tab).

21 41. To be eligible for Plus-Up grants, districts and charters may not “requir[e] the
 22 use of face coverings during instructional hours and on school property (with the exception
 23 of CDC transportation guidelines);” though schools have every ability to encourage
 24 practices recommended by the CDC and students were not prohibited from doing so.
 25 District and charters must also “remain[] open for in-person instruction as of August 27,
 26 2021 and throughout the remainder of the school year.” *Id.* (under “Eligibility” tab).

27 42. Also on August 17, 2022, Governor Ducey announced the COVID-19
 28 Educational Recovery Benefit Program (“ERB”) program. The ERB program supplied \$10

1 million in ARPA monies for K-12 students and families facing financial and educational
 2 barriers due to school closures and mandates.

3 43. To be eligible for an ERB award, K-12 students and parents must demonstrate
 4 that: (1) their household income is at or below 350% of the Federal Poverty Level; and (2)
 5 their current school is requiring the use of face coverings during instructional hours and on
 6 school property (with the exception of CDC transportation guidelines). *Covid-19*
 7 *Educational Recovery Benefit*, FACTS (last visited Jan. 20, 2022),
 8 <https://online.factsmgt.com/grant-aid/inst/4NXJL/landing-page>. The ERB program
 9 provides funding of up to \$7,000 per student. *Id.* Among other things, ERB funds may be
 10 spent on school tuition, online tutoring, childcare, daycare fees, after-school care fees, and
 11 before-school care fees of Arizona Department of Economic Security-contracted providers.
 12 *Id.*

13 44. The application materials for Plus-Up and the ERB both state: “The Arizona
 14 Office of the Governor supports and encourages schools informing educators, parents and
 15 students of the CDC recommendations regarding COVID-19 Mitigation Policies.” *See*
 16 *Covid-19 Educational Recovery Benefit*, *supra*; *State Fiscal Recovery Fund: Education*
 17 *Plus-Up (EPU)*, *supra*.

18 45. Plus-Up and the ERB both fall within the ARPA’s authorization to use
 19 SLFRF monies to address the “negative economic impacts” of COVID-19. 42 U.S.C.
 20 § 802(c)(1).

21 **IV. The Governor’s Office Responds to Treasury’s Concerns about Plus-Up and**
 22 **ERB**

23 46. On October 5, 2021, Treasury wrote a letter to the Governor’s Office of
 24 Strategic Planning and Budgeting (“OSPB”), asserting that Plus-Up and ERB “undermine
 25 evidence-based efforts to stop the spread of COVID-19.” [Exhibit 3, Oct. 5, 2021 Letter
 26 from U.S. Department of Treasury to Governor Ducey, at 1.]

27 47. More specifically, Treasury took issue with the Plus-Up program stating that
 28 the program conditions SLFRF funding on “the recipient school districts not requiring the

1 use of face coverings during instructional hours and on school property.” [Id.] Similarly,
 2 Treasury complained that the ERB program provides “up to \$7,000 per student to families
 3 for tuition or other educational costs at a new school that does not require face coverings if
 4 the student’s current school is requiring the use of face coverings during instructional hours
 5 and on school property.”² [Id.]

6 48. In the October 5 letter, Treasury, without asking for information to justify the
 7 State’s program, stated that “[a] program or service that imposes conditions on participation
 8 or acceptance of the service that would undermine efforts to stop the spread of COVID-19
 9 or discourage compliance with evidence-based solutions for stopping the spread of COVID-
 10 19 is not a permissible use of SLFRF funds.” [Id. at 2.] However, Treasury did not cite any
 11 text from ARPA to support its contention that Plus-Up or ERB were not permissible uses
 12 of SLFRF funds.

13 49. In support of its position that SLFRF funds may not be used on programs that,
 14 in Treasury’s view, “discourage compliance with evidence-based solutions for stopping the
 15 spread of COVID-19,” Treasury instead cited to pages 26786 and 26790 of the Interim Final
 16 Rule. But this language is not found on page 26786 or page 26790. *See* 86 Fed. Reg. 26786,
 17 26790. Indeed, nothing in page 26786 of the Interim Final Rule places constraints on the
 18 use of SLFRF monies. Rather, that page provides “background information” about the
 19 COVID-19 pandemic. *See* 86 Fed. Reg. at 26786.

20 50. Similarly, nothing on page 26790 of the Interim Final Rule places constraints
 21 on the use of SLFRF monies. Rather, that page sets forth certain “Eligible Public Health
 22 Uses” of SLFRF monies. *See* 86 Fed. Reg. at 26790.

23 51. In the October 5 letter, Treasury demanded that OSPB supply a “response
 24 describing how the State will remediate the issues identified” with Plus-Up and ERB. Citing
 25 31 C.F.R. § 35.10, Treasury stated that “[f]ailure to respond to or remediate may result in
 26 administrative or other action.” [Ex. 3 at 2.]

27 2 Nothing in either the Plus-Up program or the ERB program prohibited students from
 28 wearing masks or taking other precautions against COVID.

1 52. The Governor’s Office responded on November 4, 2021 with a letter to
 2 Treasury detailing how these programs sought to address the negative economic impacts of
 3 COVID-19, as permitted by ARPA, and how the programs were consistent “with the
 4 guidance released by the Treasury governing the program, including the Interim Final Rule
 5 and all posted Frequently Asked Questions (FAQs).” [Exhibit 4, Nov. 4, 2022 Letter from
 6 OSPB to Treasury, at 3.]

7 53. Regarding Plus-Up, OSPB stated that this program “addresses educational
 8 disparities by ensuring schools have the funding necessary to effectively meet the needs of
 9 every student, regardless of their family’s income or socioeconomic status.³ Moreover, by
 10 limiting funding to only schools that remain open for in-person instruction, the State is
 11 addressing the significant educational disparities caused by remote learning during the
 12 COVID-19 pandemic.” [Id.]

13 54. Regarding ERB, OSPB stated that this program “empowers parents to
 14 exercise their freedom to make informed decisions regarding their child’s educational
 15 needs. For parents who prioritize their child’s social, emotional, and mental health needs
 16 and believe a mask mandate would adversely impact their child, the program offers these
 17 parents the freedom and funding to enroll their student in a different program absent of a
 18 mask mandate. To reduce the spread of COVID-19 without the need for masks, Arizona
 19 already offers free COVID-19 testing for all residents.” [Id. at 3-4.]

20 55. The November 4 letter also cited specific provisions of the Interim Final Rule,
 21 and Treasury FAQs on that rule, further demonstrating that Plus-Up and ERB were
 22 permissible uses of SLFRF funds. [Id. at 3.]

23 56. Additionally, the November 4 letter provided other important background
 24 information supporting the two programs. For instance, the November 4 letter explained
 25 that students in the “poorest 20% of U.S. neighborhoods” are most damaged by the COVID-
 26 19 pandemic. [Id. at 1.] It also noted that, according to the CDC, COVID-19 “has a lower

27

 28 ³ This funding was necessary because of the grossly disproportionate distribution of federal
 funding to some schools over others when all schools suffered effects from COVID-19.

1 likelihood of transmission among students.” [Id.] “Indeed, in the United Kingdom, frequent
 2 rapid testing was found to be effective at reducing the transmission of the Delta COVID-19
 3 variant amongst students, even if students did not wear masks.” [Id.] The November 4 letter
 4 further stated that “experts have warned that masks can be harmful to children’s emotional
 5 development, as seeing faces and reading emotional queues are critical for school-aged
 6 children.” [Id. at 2.]

7 **V. Treasury Issues a Final Rule Attaching New, Unlawful Restrictions on the Use
 8 of SLFRF Funds.**

9 57. On January 6, 2022, Treasury issued a Final Rule that “adopt[ed] as final the
 10 interim final rule published on May 17, 2021 with amendments.” [Exhibit 5, Final Rule, at
 11 1.]

12 58. One such “amendment” added in the Final Rule, though, was a wholesale
 13 change to the previous provisions that is not supported by ARPA. That amendment is a
 14 purported prohibition on using SLFRF funds on a “program or service that imposes
 15 conditions on participation or acceptance of the service that would undermine efforts to stop
 16 the spread of COVID-19 or discourage compliance with recommendations and guidelines
 17 in CDC guidance for stopping the spread of COVID-19.” [Id. at 346 (also explaining that
 18 “recipients may not use funds for a program that undermines practices included in the
 19 CDC’s guidelines and recommendations for stopping the spread of COVID-19”); *see also*
 20 *id.* at 10, 58 (similar).]

21 59. Supposedly impermissible “programs or services” to be determined by
 22 Treasury include “programs that impose a condition to discourage compliance with
 23 practices in line with CDC guidance (e.g., paying off fines to businesses incurred for
 24 violation of COVID-19 vaccination or safety requirements), as well as programs that require
 25 households, businesses, nonprofits, or other entities not to use practices in line with CDC
 26 guidance as a condition of receiving funds (e.g., requiring that businesses abstain from
 27 requiring mask use or employee vaccination as a condition of receiving SLFRF funds).”
 28 [Id. at 346.]

Snell & Wilmer
 L.L.P.

LAW OFFICES
 One Arizona Center, 400 E. Van Buren, Suite 1900
 Phoenix, Arizona 85004-2202
 602.382.6000

1 60. The Final Rule does not cite any statutory text from ARPA to support this
 2 new prohibition. No such text exists.

3 61. The prohibition on using SLFRF funds for programs that allegedly
 4 “undermine” constantly changing CDC recommendations related to COVID-19 mitigation
 5 efforts is also not found in the Interim Final Rule.

6 62. Treasury is not a public health agency and does not have expertise in stopping
 7 the spread of COVID-19.

8 63. The effective date of the final rule is April 1, 2022. [*Id.* at 1.] Until the Final
 9 Rule becomes effective, the Interim Final Rule remains binding and effective. [*Id.* at 121.]

10 **VI. Citing the Final Rule, Treasury Demands Action by the Governor Within 60
 11 Days.**

12 64. On January 14, 2022, Treasury sent another letter to the Governor’s Office,
 13 once again raising concerns with Plus-Up and ERB. The letter re-iterated Treasury’s flawed
 14 position that SLFRF monies may not be used on programs that supposedly “undermine”
 15 efforts to stop the spread of COVID-19 and that Plus-Up and the ERB supposedly fail that
 16 test because of how they address school mask mandates. [Exhibit 6, Jan. 14 Letter from
 17 Treasury to OSPB, at 1-2.] Based on this, Treasury claimed that the Plus-Up program and
 18 the ERB program “as currently structured are ineligible uses of SLFRF funds.” [*Id.* at 2.]

19 65. Similar to its previous letter, Treasury did not point to any statutory text from
 20 ARPA to support its position. The January 14 letter does not even cite 42 U.S.C. § 802(c)
 21 or any other provision of the ARPA.

22 66. The January 14 letter instead makes the irrelevant point that “the Interim Final
 23 Rule permits SLFRF funds to be used for a range of COVID-19 mitigation strategies,
 24 including face coverings, vaccination programs, and improved ventilation.” [*Id.* at 1 n.1.]
 25 But this is simply one of the *non-exclusive*, possible uses of SLFRF monies. There is no
 26 mandate in ARPA, or the Interim Final Rule, that SLFRF monies be used on “COVID-19
 27 mitigation strategies.”

28 67. At different points, the January 14 letter also cites the Final Rule. Most

1 relevant here, the January 14 letter asserts: “[t]he Final Rule, which was issued on January
 2 6, 2022, further clarifies how SLFRF funds may be used, including that a recipient may not
 3 use SLFRF funds for a program, service, or capital expenditure that includes a term or
 4 condition that undermines efforts to stop the spread of COVID-19.” [Jan. 14 Letter at 1 n.1.]

5 68. The January 14 letter does not acknowledge that the Final Rule only becomes
 6 effective on April 1, 2022. Nor did Treasury provide any basis for giving the Final Rule
 7 retroactive effect to recoup previously distributed SLFRF monies. *See, e.g., Afanador v.*
 8 *Garland*, 11 F.4th 985, 991 (9th Cir. 2021) (“When an agency engages in formal
 9 rulemaking, the rules it promulgates are analogous to legislation and are construed to apply
 10 only prospectively (unless Congress has expressly authorized it to promulgate a
 11 retroactively applicable rule.”).

12 69. Nevertheless, the January 14 letter used that not-yet-effective Final Rule to
 13 demand action by the Governor. In particular, Treasury stated that the Governor must “(i)
 14 redirect SLFRF funds to eligible uses or (ii) remediate the issues with the Education Plus-
 15 Up Grant Program and the COVID-19 Educational Recovery Benefit Program by
 16 redesigning the programs to eliminate any elements that are inconsistent with the purpose
 17 and requirements of the SLFRF program.” [Ex. 6 at 2.]

18 70. Treasury described two consequences from a lack of compliance with its
 19 demands. First, it stated that “[f]ailure to take either step within sixty (60) calendar days
 20 may result in Treasury initiating an action to recoup SLFRF funds used in violation of the
 21 eligible uses.” [Id.] Second, Treasury stated that it “may also withhold funds from the State
 22 of Arizona’s second tranche installment of SLFRF funds until Treasury receives
 23 information that confirms that the issues described above have been adequately addressed.”
 24 [Id.]

25 71. In light of this history, there is no question that this controversy is ripe and
 26 that Governor Ducey has Article III standing. Treasury had no statutory authority to require
 27 the State to use SLFRF monies in a manner that, pursuant to Treasury’s sole discretion,
 28 would not undermine efforts to stop the spread of COVID-19. Instead, Treasury, in an

1 abuse of discretion, issued the Final Rule well in excess of its statutory authority. With the
 2 recent issuance of the Final Rule, however, Treasury has demanded that Governor Ducey
 3 either comply with the Rule—even though it far exceeds Treasury’s statutory authority—
 4 or else face recoupment and withholding of SLFRF monies within 60 days.⁴ The Governor’s
 5 Office will not eliminate or change the Plus-Up and ERB programs to conform to
 6 Treasury’s unlawful dictates. The concrete and particularized injury-in-fact to the Governor
 7 is therefore actual or imminent, not conjectural or hypothetical. *See, e.g., Skyline Wesleyan*
 8 *Church v. Cal. Dep’t of Managed Health Care*, 968 F.3d 738, 748 (9th Cir. 2020); *Bishop*
 9 *Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153-54 (9th Cir. 2017).

10 **FIRST CAUSE OF ACTION**

11 **(Violation of the Administrative Procedure Act—Final Rule)**

12 72. Governor Ducey incorporates the allegations in the preceding paragraphs as
 13 if fully set forth herein.

14 73. The Administrative Procedure Act (“APA”) authorizes the Court to hold
 15 unlawful and set aside agency action that is “in excess of statutory jurisdiction, authority,
 16 or limitations, or short of statutory right,” or is “arbitrary, capricious, an abuse of discretion,
 17 or otherwise not in accordance with law.” 5 U.S.C. § 706(2).

18 74. The Final Rule is a final agency action within the meaning of the APA. 5
 19 U.S.C. § 551(13).

20 75. Governor Ducey has suffered legal wrong and is adversely affected or
 21 aggrieved by the Final Rule. 5 U.S.C. § 702. As stated, Governor Ducey is the party
 22 authorized by Arizona law to accept and expend the SLFRF monies that Treasury seeks to
 23 withhold and recoup. *See A.R.S. § 41-101.01(A)*. The Final Rule seeks to impose new
 24 conditions on how Governor Ducey may exercise this authority, and prohibit programs like
 25 Plus-Up and ERB that were instituted before the issuance of the Final Rule. Indeed,

26 _____
 27 ⁴ The Governor notes that Treasury further abused its authority by requiring the State of
 28 Arizona to comply with the Final Rule before that rule ever goes into effect, since the
 response would be due to Treasury on March 15, 2022 and the rule would not go into effect
 until April 1, 2022.

1 Treasury specifically cited the Final Rule as grounds to demand that Governor Ducey
 2 change these programs within 60 days or else face recoupment and withholding of SLFRF
 3 monies.

4 76. It is axiomatic that a federal agency must have statutory authority for the
 5 regulations it issues. *See, e.g., Mexichem Fluor, Inc. v. Env't Protection Agency*, 866 F.3d
 6 451, 460 (D.C. Cir. 2017) (“The agency must have statutory authority for the regulations it
 7 wants to issue.”). “Merely because an agency has rulemaking power does not mean that it
 8 has delegated authority to adopt a particular regulation.” *N.Y. Stock Exch. LLC v. SEC*, 962
 9 F.3d 541, 554 (D.C. Cir. 2020).

10 77. Here, the Final Rule far exceeds the limited statutory authority granted to
 11 Treasury by ARPA. That statute did not confer Treasury with power to prohibit States from
 12 expending SLFRF monies in a manner that in Treasury’s subjective and extraordinary
 13 determination “would undermine efforts to stop the spread of COVID-19 or discourage
 14 compliance with recommendations and guidelines in CDC guidance for stopping the spread
 15 of COVID-19.” [Ex. 5 at 346].

16 78. To the contrary, Congress specifically described the permissible uses of
 17 SLFRF funds, as well as restrictions on such uses, in 42 U.S.C. § 802(c). In describing how
 18 the funds may be used, Congress did not prohibit States from expending SLFRF monies in
 19 a manner that Treasury subjectively believes will “undermine” COVID-19 mitigation
 20 efforts or require states to follow CDC guidance in implementing programs that expend
 21 SLFRF monies. Neither § 802(c), nor any other provision of ARPA, authorizes Treasury to
 22 create new restrictions that are untethered to and inconsistent with the text of the ARPA.

23 79. The first category of permissible use of SLFRF monies identified by Congress
 24 discussed is particularly instructive here. That category allows SLFRF monies to be used
 25 “to respond to the public health emergency with respect to the Coronavirus Disease 2019
 26 (COVID-19) *or* its negative economic impacts.” 42 U.S.C. § 802(c)(1)(A) (emphasis
 27 added). Congress used the word “or”—not “and.” At no point did Congress suggest that,
 28 in addressing “negative economic impacts,” States must structure programs to comply with

1 COVID-19 mitigation guidance.

2 80. Nor is the Final Rule’s extra-statutory restriction on SLFRF monies
 3 “necessary or appropriate to carry out” Section 802 of ARPA. *See* 42 U.S.C. § 802(f).

4 81. Although the plain language of ARPA is sufficient to conclude that the Final
 5 Rule exceeds Treasury’s statutory authority, this conclusion is buttressed by the “major
 6 questions” doctrine. Under this doctrine, and as recently affirmed by the U.S. Supreme
 7 Court, courts “expect Congress to speak clearly when authorizing an agency to exercise
 8 powers of vast economic and political significance.” *Ala. Assn. of Realtors v. Dep’t of*
 9 *Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation omitted); *Nat'l Fed'n of*
 10 *Indep. Bus.*, 2022 WL 120952, at *3 (same).

11 82. If Congress intended to give Treasury—which has absolutely no expertise in
 12 matters of public health—the authority to withhold or recoup tens of millions of dollars
 13 from States based on Treasury’s subjective assessment of whether a State program
 14 “undermines” COVID-19 mitigation efforts, Congress needed to “speak clearly.”

15 83. The need for Congress to “speak clearly” is particularly pressing where, as
 16 here, Treasury’s Final Rule would “intrude[] into . . . area[s] that [are] the particular domain
 17 of state law”—public health and education policy. *Ala. Assn. of Realtors*, 141 S. Ct. at 2489.
 18 By contrast, public-health policy is completely outside the domain of Treasury, which lacks
 19 the expertise required to assess whether a particular expenditure of SLFRF funds “would
 20 undermine efforts to stop the spread of COVID-19.”

21 84. Because Congress did not “speak clearly” (or, indeed, speak at all) on this
 22 issue of vast economic and political significance, the Final Rule exceeds Treasury’s
 23 statutory authority. It is also arbitrary, capricious, an abuse of discretion, and contrary to
 24 law. The Final Rule must therefore be held unlawful and set aside pursuant to 5 U.S.C. §
 25 702(2)(A) and (2)(C).

26 ...

27 ...

28 ...

Snell & Wilmer
L.L.P. ——————
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

SECOND CAUSE OF ACTION

(Violation of the Administrative Procedure Act—January 14 Treasury Demand Letter)

85. Governor Ducey incorporates the allegations in the preceding paragraphs as if fully set forth herein.

86. The January 14 letter is a final agency action within the meaning of the APA. 5 U.S.C. § 551(13).

87. Because Arizona law makes Governor Ducey responsible for accepting and expending the SLFRF monies that Treasury seeks to withhold and recoup, A.R.S. § 41-101.01(A), Governor Ducey has suffered legal wrong and is adversely affected or aggrieved by the January 14 letter. 5 U.S.C. § 702.

88. Treasury exceeded its statutory authority under 42 U.S.C. § 802, acted arbitrarily and capriciously, and abused its discretion, and acted contrary to law in demanding that Governor Ducey eliminate or modify the Plus-Up and ERB programs on the grounds that these programs allegedly “impose[] conditions on participation in or acceptance of the service that would undermine efforts to stop the spread of COVID-19 or discourage compliance with recommendations and guidelines in CDC guidance for stopping the spread of COVID-19.” [Ex. 5 at 346; *see also* Ex. 6 at 1.].

89. Nothing in ARPA authorizes Treasury to impose such conditions on SLFRF monies. None of the four categories of permissible use, or the two use restrictions, in 42 U.S.C. § 802(c) come close to prohibiting States from expending SLFRF monies in a manner that Treasury determines will “undermine” COVID-19 mitigation efforts or require compliance with CDC guidance or recommendations. Nor does anything in ARPA give Treasury authority to impose new conditions on how SLFRF monies are used that are not found anywhere in the statutory text.

90. Likewise, the Interim Final Rule fails to authorize Treasury's action. That rule does not say anything about mask mandates in schools or any other measures that supposedly "undermine" COVID-19 mitigation efforts. Similarly, the Interim Final Rule

does not require States to abide secondhand, ever-changing CDC guidance in implementing programs that expend SLFRF monies.

91. The Final Rule also cannot provide any grounds for recoupment or withholding since that Rule exceeds Treasury's authority and does not become effective until April 1, 2022.

92. Plus-Up and ERB are entirely consistent with 42 U.S.C. § 802(c) because they respond to the “negative economic impacts” of the COVID-19 pandemic by, among other things, providing economic assistance to households and schools to address the pandemic’s impact on education.

93. Because Treasury's actions have no basis in statute or the currently effective regulation, Treasury has exceeded its authority, abused its discretion, and acted arbitrarily, capriciously, and contrary to law, all in violation of the APA. *See* 5 U.S.C. § 706(2). The January 14 letter must therefore be held unlawful and set aside pursuant to 5 U.S.C. § 702(2)(A) and (2)(C).

THIRD CAUSE OF ACTION

(Declaratory Judgment—Violation of the Spending Clause)

94. Governor Ducey incorporates the allegations in the preceding paragraphs as if fully set forth herein.

95. Article I, § 8, cl. 1 of the U.S. Constitution (the Spending Clause) empowers Congress to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”

96. If, however, Congress “desires to condition the States’ receipt of federal funds,” then it “must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (alteration in original).

97. If the Final Rule is authorized by statute (it is not), then it violates the Spending Clause because the enabling statute, 42 U.S.C. § 802, is ambiguous in the strings

1 it attaches to the use of SLFRF monies.

2 98. In particular, 42 U.S.C § 802 does not give States any notice that SLFRF
 3 monies could, at some future date, be withheld or recouped based on Treasury's
 4 determination that the State's use of the monies "undermine[s] efforts to stop the spread of
 5 COVID-19." And § 802 certainly does not alert States to the possibility that their use of
 6 SLFRF monies must comport with the CDC's ever-changing COVID-19 guidance.

7 99. Accordingly, even if the Final Rule is somehow authorized by statute, it
 8 violates the Spending Clause.

9 **FOURTH CAUSE OF ACTION**

10 **(Declaratory Judgment—Violation of the Non-Delegation Doctrine)**

11 100. Governor Ducey incorporates the allegations in the preceding paragraphs as
 12 if fully set forth herein.

13 101. Article I, § 1, of the U.S. Constitution vests "[a]ll legislative Powers herein
 14 granted ... in a Congress of the United States."

15 102. Thus, "when Congress confers decisionmaking authority upon agencies
 16 Congress must 'lay down by legislative act an intelligible principle to which the person or
 17 body authorized to [act] is directed to conform.'" *Whitman v. Am. Trucking Assoc.*, 531
 18 U.S. 457, 472-73 (2001) (quoting *J.W. Hampton, Jr. & Co v. United States*, 276 U.S. 394,
 19 409 (1928)) (emphasis in original omitted).

20 103. If the Final Rule is authorized by ARPA (again, it is not), then this means that
 21 the Act sets forth no "intelligible principle[s]" guiding Treasury's decisions to withhold or
 22 recoup SLFRF monies.

23 104. Rather, if the Final Rule is authorized by ARPA, then this means Treasury
 24 has unfettered discretion to add new conditions on SLFRF funds, including conditions based
 25 on Treasury's beliefs about what COVID-19 mitigation strategies are appropriate, despite
 26 the fact that Treasury is not a public health agency and does not have expertise in this area.

27 105. Accordingly, if the Final Rule falls within the authority granted to Treasury
 28 by ARPA, then the Act violates the non-delegation doctrine.

1 DATED this 21st day of January, 2022.
2
3
4

GENERAL COUNSEL

5 By: /s/ Anni L. Foster
6

Anni L. Foster
7 Office of Governor Douglas A. Ducey
1700 West Washington Street
Phoenix, Arizona 85007

8 SNELL & WILMER L.L.P.
9

10 By: /s/ Brett W. Johnson
11

Brett W. Johnson
12 Colin P. Ahler
13 Derek C. Flint
14 Ian R. Joyce
15 One Arizona Center
16 400 E. Van Buren, Suite 1900
17 Phoenix, Arizona 85004-2202
18
19
20
21
22
23
24
25
26
27
28

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000